

No. 89-1917

Supreme Court, U.S.

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In The  
Supreme Court of the United States  
October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI,  
MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD.,  
MICHAEL TINIK, OLYMPIA ARENAS, INC.,

*Petitioners,*

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,

*Respondent.*

RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

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**QUESTION PRESENTED**

Whether a lawsuit alleging antitrust violations based upon events occurring subsequent to a dismissal with prejudice of a prior action is barred by the *res judicata* effect of the prior dismissal order.

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**RESPONSE TO PETITION FOR WRIT OF  
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**COUNTER STATEMENT OF THE CASE**

This case involves claims by Cellar Door Productions, Inc. of Michigan ("Cellar Door") that Prophet Productions, Ltd. ("Brass Ring") and Olympia Arenas, Inc. ("Olympia")<sup>1</sup> engaged in activities violative of pertinent antitrust laws in connection with the operation and leasing of Joe Louis Arena and Cobo Arena (the "Arenas"), located in Detroit, Michigan.

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<sup>1</sup> Brass Ring and Olympia will collectively be referred to as "Petitioners".

Cellar Door promotes and produces arena attraction musical events. An arena attraction features a performer potentially capable of selling approximately 10,000 to 20,000 seats for one performance. Typically, the performer will require a financial guaranty for the performance. The amount that a promotion company such as Cellar Door or Petitioners can offer as a guaranty depends upon the lease price that the promotion company can secure from the facility hosting the performance.

The Arenas are owned by the City of Detroit and leased to Olympia through an agreement dated August 16, 1978. Olympia has operational control over the leasing of the arenas for musical events. The Arenas are essential facilities for the promotion and production of arena attraction musical events in the metropolitan Detroit area due to their substantial seating capacity, economic feasibility, and geographic location. The Arenas are the only arena level year-round facilities in the Detroit market.

Cellar Door contends that Petitioners have improperly employed an exclusive arrangement for the promotion of musical events at the Arenas. This arrangement effectively denies Cellar Door access to the Arenas for the promotion and production of musical events. Specifically, as a result of the arrangement, the Arenas are not offered to Cellar Door on the same rental terms as offered to Petitioners. As a result, Petitioners are able to offer performers more compensation and a better financial guaranty for events taking place at the Arenas. The Olympia-Brass Ring arrangement has effectively precluded Cellar

Door from competing with Petitioners in the Detroit market.<sup>2</sup>

As a result of the discriminatory pricing, Cellar Door filed an action in 1983 against Olympia and Brass Ring. Cellar Door moved for an injunction pending trial to enjoin the Defendants from refusing to grant Cellar Door access to the Arenas on equivalent terms to those offered to Brass Ring. The request for injunctive relief was denied.

On September 23, 1983, a meeting was held between Jack Boyle ("Boyle"), Chairman of the Board of Cellar Door, and Robert Cavalieri, as well as other representatives of Olympia. The meeting concerned the pending antitrust lawsuit. It was represented to Boyle that if Cellar Door dismissed the suit it would be granted equal access to the Arenas on non-discriminatory terms. Boyle thereafter instructed his counsel to dismiss the 1983 lawsuit. Subsequently, by stipulation of counsel, an order of dismissal, with prejudice, was entered by the Honorable Anna Diggs Taylor on November 7, 1983.

Following the dismissal of the 1983 lawsuit, Cellar Door obtained equal access for several events at the Arenas in the summer of 1984. Brass Ring and Olympia, however, again began to discriminate against Cellar Door with respect to the rental charges for the Arenas. As a result, Cellar Door found it impossible to compete with

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<sup>2</sup> A party that controls an essential facility and denies other parties access to the facility violates Section 2 of the Sherman Act. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) *cert. den'd.*, 436 U.S. 956 (1978).

Brass Ring in the Detroit market. Accordingly, the present lawsuit was filed in February 1987. The action complains of antitrust violations committed by Brass Ring subsequent to the dismissal of the 1983 action.

Limited discovery occurred prior to the District Court's grant of summary judgment in favor of Petitioners. Edward Leffler ("Leffler"), a theatrical and personal manager who represents the band Van Halen, testified that, in conjunction with Van Halen's tour in 1986, he desired to book his band at Joe Louis Arena. He stated that there was no viable, practical substitute to Joe Louis Arena for his band in the Detroit area. (App. A, pp. A-2, 3-4).

Leffler testified that the concert was promoted by Brass Ring because that company offered a considerably better deal than anyone else. (App. A, p. A-5). He further testified that he was very reluctant to deal with Brass Ring, due to previous problems he had experienced with that company, but he nevertheless accepted Brass Ring's offer because it was so substantially better than other offers that had been presented. (App. A, pp. A-6-10). Leffler was told by Rick Kay ("Kay") of Brass Ring that Brass Ring had an arrangement with the Arena that made it impossible for anyone else to make Leffler a better offer. (App. A, p. A-11). Leffler testified that, without question, he would have allowed Cellar Door to promote the concert but for the offer made by Kay, which was impossible for Cellar Door to match. (App. A, pp. A-12-13).

Petitioners filed motions for summary judgment in July 1987. The motions were based upon the *res judicata*

effect of the 1983 dismissal with prejudice. In response, Cellar Door's counsel relied on the U.S. Supreme Court decision in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322; 75 S.Ct. 865 (1955). Cellar Door contended that in *Lawlor* the court held, in unequivocal terms, that a stipulation of dismissal with prejudice in an antitrust action does not constitute a bar to new litigation based on subsequent conduct, even if that conduct is essentially the same course of wrongful conduct as set forth in the cause of action dismissed by stipulation. Cellar Door asserted that the present action involves refusals to deal on an equal basis for events that Cellar Door attempted to book in the years subsequent to the dismissal, (i.e., a Van Halen concert in 1986), and that these refusals could not possibly have been sued upon in the original action because they did not occur until several years after the stipulation for dismissal had been entered.

The Court, however, granted Petitioners' motions finding *res judicata* to be applicable. The Court found the matters contested in the present case identical to those adjudicated by the Court in the 1983 action, in that both cases allege that the lease agreement between the City of Detroit and Olympia violated applicable antitrust laws.<sup>3</sup>

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<sup>3</sup> Cellar Door's counsel had explained that it was not the lease that Cellar Door complained of, but rather that Brass Ring and Olympia applied the authority granted under the lease in a discriminatory manner. Nevertheless, the Court granted the motions on the basis that both cases "... concern an exclusive lease agreement . . . alleged to have denied plaintiff access to Cobo Hall and Joe Louis Arena . . ." (App. B, p. B-3).

In a decision issued March 8, 1990, the United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit") reversed the District Court's grant of summary judgment. The court concluded that Petitioners' course of conduct could give rise to more than one cause of action. Relying upon *Lawlor*, the Court concluded that the alleged wrongful conduct occurring subsequent to the dismissal of the 1983 lawsuit was not barred by *res judicata* principles, stating:

In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action that arose subsequent to the 1983 dismissal are not barred by *res judicata*.

Petitioners filed a petition for writ of certiorari on June 6, 1990. They contend that the Sixth Circuit decision improperly establishes a "per se rule" that a judgment in one action can never have claim preclusive effect with respect to conduct occurring subsequent to the first action. Cellar Door answers that Petitioners mischaracterize the Sixth Circuit decision, and deny that it establishes such a "per se rule". Moreover, Cellar Door contends that the Sixth Circuit decision is completely consistent with existing law and that Petitioners fail to establish any suitable basis for this court to grant certiorari.

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## ARGUMENT

A LAWSUIT ALLEGING ANTITRUST VIOLATIONS BASED UPON EVENTS OCCURRING SUBSEQUENT TO A DISMISSAL WITH PREJUDICE OF A PRIOR ACTION IS NOT BARRED BY THE *RES JUDICATA* EFFECT OF THE PRIOR DISMISSAL ORDER.

A. *Lawlor* And Its Progeny.

Both the Sixth Circuit decision and Petitioners' brief focus upon the Supreme Court's decision in *Lawlor*. In *Lawlor*, the plaintiff originally brought an antitrust action in 1942 alleging that its competitor had secured exclusive licenses in the motion picture accessory market, and that those licenses resulted in a monopoly. A year later, the parties settled their dispute, and a dismissal with prejudice was entered. In 1949, the plaintiff brought a second lawsuit alleging antitrust violations occurring subsequent to the dismissal of the 1942 action. The plaintiff named as defendants the three producers who were parties to the 1942 suit, as well as five producers licensed subsequent to the dismissal of the 1942 suit.

The defendants moved for summary judgment on the basis of the *res judicata* effect of the 1942 order of dismissal. The District Court granted the motion and the Third Circuit Court of Appeals affirmed. However, the Supreme Court reversed. In no uncertain terms, the Supreme Court held that in the context of continuing antitrust violations, a stipulation for dismissal with prejudice does not constitute a bar to new litigation based upon subsequent conduct, even if that conduct is essentially the same as that alleged in the original lawsuit and covered by the stipulation and order of dismissal.

In so holding, the *Lawlor* court initially recognized that under the doctrine of *res judicata*, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. *Lawlor*, at 326. Accordingly, the Court characterized the issue before it as "whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942." *Lawlor*, *Id.* The Court then stated that the trial court erred in concluding that the 1942 and 1949 suits were based on the same cause of action:

*That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct – for example, an abateable nuisance – may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here . . . not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.*

(Emphasis provided). *Lawlor*, at 327-328.

The Court emphasized the public policy support for allowing the plaintiff to proceed with the 1949 lawsuit:

*Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondent's novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent*

with neither the antitrust laws nor the doctrine of *res judicata*.

(Emphasis provided). *Lawlor*, at 329.

As noted by the Sixth Circuit, the direct application of the *Lawlor* decision to the present case is inescapable. Both cases involve:

- (1) a prior antitrust lawsuit;
- (2) a dismissal of the prior suit upon stipulation, with prejudice;
- (3) an entry of the dismissal order unaccompanied by findings of fact, and hence, not binding on the parties on any issue;
- (4) a second suit based upon antitrust violations occurring subsequent to the entering of the order of dismissal in the original lawsuit.

The *Lawlor* doctrine rejecting the defense of *res judicata* has been consistently applied in actions alleging a continuing scheme to violate antitrust laws subsequent to a prior dismissal order. For example, in *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1964)<sup>4</sup>, the Sixth Circuit relied upon *Lawlor* in reversing the District Court's grant of summary judgment in favor of the defendants based upon a *res judicata* defense.

In *Cream Top*, the plaintiffs filed an antitrust suit alleging that the defendants participated in a continuing restraint of trade affecting the sale of dairy products. Specifically, plaintiffs alleged the defendants discriminated systematically in pricing among their customers in

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<sup>4</sup> Here, the Sixth Circuit placed appropriate reliance on the *Cream Top* decision.

order to create a monopoly in certain markets. The plaintiffs had been parties to a previous state court antitrust action based upon the same allegations against the same defendants, entitled *Cherokee Sanitary Milk Co. v. Dean Milk, Inc.* (hereinafter referred to as "Cherokee"). A dismissal with prejudice was entered in Cherokee. In *Cream Top*, the District Court granted defendant's motion for summary judgment, holding that the dismissal with prejudice of Cherokee was tantamount to a trial and final judgment and hence was *res judicata*.

The Sixth Circuit reversed, based upon *Lawlor*:

Further, it is our opinion that the doctrine of *res judicata* is not applicable in the present case. As the Supreme Court stated in *Lawlor, supra*, the fact that 'both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct - for example, an abateable nuisance - may frequently give rise to more than a single cause of action.' (Citation omitted.) Here the amended complaint in the *Cream Top* case charges that Dean made unlawful sales at discriminatory prices . . . beginning in 1952 and continuing up to the date of the second amended complaint in 1964. *At least insofar as the complaint alleges violations since the dismissal of the Cherokee case, the judgment in that case cannot be given the effect of extinguishing a claim which arose subsequent to that judgment. Lawlor v. National Screen Service, supra.*

(Emphasis provided). *Cream Top*, at 363.

Importantly, the *Cream Top* court concluded its opinion by stating:

With respect to the allegations of price discrimination, it is to be emphasized that *this is not an action based upon a single wrongful transaction*

*from which continuing damages may have resulted. The wrongful conduct charged in this case is composed of a multitude of separate transactions alleged to have been discriminatory. Each such transaction or group of transactions, if proved to have the effects proscribed by the Robinson-Patman Act, might be held to be a separate legal wrong.*

(Emphasis provided). *Cream Top*, at 364.

Similarly, in the present case the wrongful conduct charged is composed of a multitude of separate transactions involving events booked by Petitioners at the Arenas subsequent to 1983. Each such occurrence, if proven by Cellar Door to be violative of applicable anti-trust laws, constitutes a separate actionable legal wrong.

A similar ruling was rendered in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir. 1982). There, the plaintiff filed suit in 1971 alleging that the defendant was engaged in a scheme to allocate markets in violation of the Sherman Act. A trial was held, and the jury returned a verdict in favor of the plaintiff. Subsequently, plaintiff filed a motion requesting the District Court to award it supplemental damages based upon post-verdict conduct of the defendant. The District Court denied the motion on the ground that plaintiff had two pending lawsuits against defendant in which it sought damages for antitrust violations occurring subsequent to the judgment. On appeal, the Seventh Circuit held that a cause of action accrued to the plaintiff each time the defendant engaged in antitrust conduct causing harm, and therefore, the plaintiff was entitled to maintain an independent cause of action for damages caused by anti-trust conduct occurring subsequent to the initial judgment. *Ohio-Sealy*, at 494.

Another dispositive antitrust decision was rendered by the Court in *United States v. General Electric Co.*, 358 F.Supp. 731 (D.C. N.Y. 1973). In that case, the government brought an action against General Electric attacking its lamp agency marketing system. The system had been attacked in three previous actions, each of which resulted in a decision in favor of General Electric. General Electric raised the defense of *res judicata* to the 1973 action, relying upon the decisions in the three previous cases. In denying the applicability of the doctrine, the Court stated:

The *res judicata* rule that a judgment on the merits is a bar to a subsequent action between the same parties applies *only* where the subsequent action is upon the same cause of action. In the case at bar, as I view it, the cause of action sued upon is not the same but is different from the causes of action sued upon in the prior General Electric cases. The doctrine of *res judicata* as an absolute bar therefore does not apply here.

\* \* \*

In the case at bar, as in *Lawlor*, the course of conduct complained of occurred subsequent to the judgments in the prior suits. The same public policy considerations against giving a defendant immunity – in fact, perpetual immunity – from liability, for such violations in the future is present here. *Here, as in Lawlor, while the course of conduct alleged may be a continuing one, the cause of action is not the same but different from that on which the judgments in the 1926 and 1949 actions were rendered.*

(Emphasis provided). *General Electric*, at 739-740.

*Lawlor* was again followed in the context of an antitrust action in *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 576 F.Supp. 1559 (D.C. Ill. 1984). Oberweis sued Associated Milk in 1972 alleging violations of the Sherman Act. It had previously instituted an antitrust action against Associated Milk's predecessor in 1965. In the initial case, the parties agreed to a resolution, and the action was dismissed with prejudice on August 26, 1969. In denying a motion for summary judgment based upon *res judicata* brought by Associated Milk in the 1972 lawsuit, the court stated:

But to the extent (as is assumed for current purposes) the 1972 lawsuit is based on post-August 26, 1969 conduct, it fits within the precise situation defined in *Lawlor*.

*Oberweis*, at 1562.

These cases illustrate the uniform application of *Lawlor* in cases involving allegations of continuing antitrust violations. The Courts that have relied upon *Lawlor* in antitrust cases have found little, if any, difficulty with its application. Here, the Sixth Circuit properly found *Lawlor* to be dispositive. Petitioners cite no valid grounds for this Court to either reassess *Lawlor* or review the propriety of the Sixth Circuit's decision.

#### **B. The Sixth Circuit's Decision Does Not Establish A "Per Se Rule".**

Petitioners contend that the Sixth Circuit's holding establishes a per se rule which conflicts with the "better view" of *Lawlor* and the law of other circuits. In so arguing, Petitioners assert that the decision is based on

the proposition that a judgment in one action can never have a claim preclusive effect with respect to conduct occurring subsequent to that action. Petitioners' position, however, mischaracterizes the Sixth Circuit's ruling.

Rather than relying exclusively on the time element in determining that *res judicata* does not bar Cellar Door's action, the Sixth Circuit properly focused upon the nature of the ongoing conduct complained of by Cellar Door:

In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action occurring subsequent to the 1983 dismissal are not barred by *res judicata*.

Neither *Lawlor* nor the Sixth Circuit either alluded to or established a "per se rule" which establishes the element of time as preemptively dispositive on the issue of the similarity of the claims. Therefore, Petitioners clearly misconceive the rationale behind the Sixth Circuit's decision, or attempt to mischaracterize it in a harsh and rigid manner in order to draw the attention of this Court. In either case, it is clear that the "per se rule" argument that permeates Petitioners' brief is meritless and provides no basis for this Court to review the Sixth Circuit's decision.

### **C. The Sixth Circuit's Decision Does Not Conflict With Other Circuits.**

Petitioners' averment that the Sixth Circuit's decision has either been rejected by or conflicts with decisions in

other circuits relies improvidently upon Petitioners' contention that the decision hinges upon the so-called "per se rule". In the absence of this misconstruction of the Sixth Circuit's holding, it becomes clear that the decision is both consistent with and supported by decisions rendered in other circuits.<sup>5</sup>

The cases relied upon by Petitioners to establish a purported conflict are readily distinguishable. Petitioners place heavy reliance upon *Engelhardt v. Bell & Howell Company*, 327 F.2d 30 (8th Cir. 1964). In *Engelhardt*, the plaintiff brought a succession of lawsuits arising out of the defendant's alleged breach of a "retail dealer franchise agreement". Importantly, the case involves a single breach of contract, one and only one refusal to deal, and thus only one transaction. Thus, the Sixth Circuit properly found *Engelhardt* to be nondispositive.<sup>6</sup>

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<sup>5</sup> See *Singer Company v. Skil Corporation*, 803 F.2d 336, 343 (7th Cir. 1986); *Blair v. City of Greenville*, 649 F.2d 365, 368 (5th Cir. 1981); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970), cert. denied 400 U.S. 991, 91 S.Ct. 454 (1971); *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984); *Ohio-Sealy Mattress Manufacturing Company v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir. 1982); *Ohio-Sealy Mattress Manufacturing Corporation v. Kaplan*, 745 F.2d 441, 448 (7th Cir. 1984); *Davis v. Halpren*, 813 F.2d 37, 40 (2nd Cir. 1987); *United States v. General Electric Company*, 358 F.Supp. 731, 739-40 (D.C. N.Y. 1973); *Warrington USA, Inc. v. Allen*, 631 F.Supp. 1456, 1460 (D.C. Wis. 1986); *Car Carriers, Inc. v. Ford Motor Company*, 789 F.2d 589, 591 (7th Cir. 1986); *International Railways of Central America v. United Food Company*, 373 F.2d 408, 419 (2nd Cir. 1967, cert. denied, 387 U.S. 921 (1967)); *Carter-Wallis, Inc. v. United States*, 449 F.2d 1374, 1386-1388 (Court of Claims 1971).

<sup>6</sup> *Engelhardt* was similarly distinguished by the Court in *General Electric* at 740 and *Exhibitors Poster* at 1318.

In a statement of minor import to its decision, the *Engelhardt* court expressed the belief that the Supreme Court in *Lawlor* based its rejection of *res judicata* upon the addition of new defendants and allegations of a new antitrust violation occurring subsequent to the determination of the prior litigation. This dicta has been largely ignored or rejected by other courts<sup>7</sup>, and certainly does not support Petitioners' contention that a material split exists among the circuits concerning the interpretation of the *Lawlor* decision.

Petitioners next rely upon *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355 (4th Cir. 1989). This reliance, however, is misplaced. The glaring distinction between *Peugeot* and the present case is that the initial *Peugeot* litigation involved a trial and factual disposition of Peugeot's claims. In this regard, the Court in *Peugeot* noted that the disputed counterclaim involved allegations of continuing actions on the part of Peugeot which were litigated in a prior suit but continued to the present suit. *Peugeot*, at 359. The Court therefore opined:

We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation. *Peugeot, Id.*

Here, in contrast, the dismissal of the first lawsuit did not establish the appropriateness of Petitioners' actions. The District Court did not make any factual findings in the initial lawsuit that preclude Cellar Door

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<sup>7</sup> *General Electric*, at 740.

from litigating the impropriety of the Brass Ring-Olympia relationship.<sup>8</sup>

Significantly, the *Peugeot* Court neither mentioned nor attempted to interpret the *Lawlor* decision. Presumably, the absence of a discussion of *Lawlor* stemmed from the critical procedural distinction between *Peugeot* and *Lawlor*. *Peugeot* obviously turned upon the factual determinations made in the first action, while neither *Lawlor* nor the present case involve this type of consideration. In any event, *Peugeot* clearly does not involve a conflicting interpretation of *Lawlor*, as represented by Petitioners.

Next, Petitioners rely upon *Walsh v. International Longshoremen's Association, AFL-CIO Local 799*, 630 F.2d 864 (1st Cir. 1980). Again, *Walsh* fails to support the purported conflict that Petitioners attempt to create. *Walsh* involves the distinctive issue of the *res judicata* effect of a district court's determination on a petition for the imposition of preliminary injunctive relief pursuant to Section 10(l) of the National Labor Relations Act. Section 10(l) requires the request for a preliminary injunction in order to preserve the status quo until a decision has been made by the NLRB regarding the unfair labor practice charged. The court does not decide whether an unfair labor practice has occurred, but only the narrow issue of whether there is reasonable cause to believe that a violation has taken place warranting injunctive relief. *Walsh*,

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<sup>8</sup> Indeed, the District Court rejected Brass Ring's counsel's assertion during oral argument that this case involves the continuation of conduct which the court deemed lawful through the 1983 dismissal, stating: "Well, this court didn't deem it anything. It hasn't been deemed lawful. \* \* \* I think you're mixing apples and oranges, because the conduct hasn't been adjudicated lawful, you see." (App. B, p. B-2-3).

accordingly, involved the peculiar application of *res judicata* principles to a district court's determination on the injunctive relief issue.

Moreover, the *Walsh* court expressly commingled the concepts of claim preclusion and collateral estoppel,<sup>9</sup> and actually decided the case based on collateral estoppel grounds. Here, it is beyond dispute that principles of collateral estoppel have no application. Importantly, the *Walsh* court declined to determine whether the case before it alleged identical causes of action as prior suits involving requests for injunctive relief, since the court made its decision based upon the collateral estoppel effect of a prior court's determination. *Walsh*, at 873-74.

Notably, *Walsh* involved a singular core event, i.e., the directive of the International Longshoremen's Association that members should cease handling cargos bound for or arriving from the USSR in light of that nation's invasion of Afghanistan. Here, Cellar Door complains not of a singular pronouncement by Petitioners, but rather their ad hoc, event by event practice of imposing discriminatory pricing on Cellar Door. Thus, *Walsh* involves neither analogous facts nor a conflicting application of *Lawlor*.

Finally, Petitioners rely upon *Neeld v. National Hockey League*, 439 F.Supp. 446 (W.D. N.Y. 1977). This case arose out of a National Hockey League ("NHL") rule prohibiting the eligibility of players with one eye. The plaintiff initially filed an action in the United States District Court in California ("the California action") against the same

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<sup>9</sup> *Walsh* at 867, footnote 5.

defendants challenging the propriety of the by-law. The court in the California action granted summary judgment, holding the by-law to be a reasonable restraint of trade. The plaintiff then filed a second action challenging the continued refusal of the NHL to allow his participation. The defendants urged that the California action barred the second case on *res judicata* principles. The court opined:

In the case at hand, plaintiff merely alleges that defendants have continued to adhere to the Section 12.6 and have continued to utilize the amateur draft system for selecting new players, which adherence and utilization by defendants existed at the time of the California action. *There are no allegations that such conduct by defendants is not the same as had occurred prior to judgment in the California action.* Thus, I conclude that plaintiff's continuing violation theory has no place in determining whether any counts of the instant complaint are barred by *res judicata*.

(Emphasis provided). *Neeld*, at 452-453.

This holding does not create a conflicting interpretation of *Lawlor*, since *Lawlor* did involve allegations of wrongdoing by the defendants occurring subsequent to the voluntary dismissal. Moreover, as with *Walsh*, *Neeld* involves the application and propriety of a singular rule or directive. Here, Cellar Door complains not of such a proscription, but rather a number of separate instances of unlawful price discrimination.

The smokescreen that Petitioners attempt to create concerning a conflict among the circuits quickly evaporates upon a careful reading of the cited cases. The only arguable conflict arises from the discredited *Englehardt*

dicta which interprets *Lawlor's* rejection of *res judicata* as being dependent upon the addition of new defendants and new antitrust violations occurring subsequent to the initial litigation. This dicta is loosely referenced in subsequent cases but has never been found to be controlling. In fact, the circuits have been strikingly consistent in their application of *Lawlor*, especially in cases involving antitrust violations occurring subsequent to the dismissal of a first lawsuit. The circuits have applied the *Lawlor* holding uniformly and with relative ease. Consequently, no reason exists for this court to reexamine the *Lawlor* doctrine at this time.

**D. No "Uncertainty Exists In The Circuits" As To The *Lawlor* Holding.**

Petitioners argue that various circuits have expressed a good deal of uncertainty on the issue of the scope of claim preclusion in cases involving continuing conduct. Similar to Petitioners' "conflict" argument, a careful reading of the relied upon cases reveals a lack of foundation for this premise.

Petitioners aver that the Federal Circuit's decision in *The Young Engineers, Inc. v. International Trade Commission*, 721 F.2d 1305 (Fed. Cir. 1983) "suggests that the Federal Circuit found the broad view of *Lawlor* . . . hospitable."<sup>10</sup> The language of Petitioners' argument, alone, illustrates the weakness of its position. As with *Walsh* and *Neeld*, *Young Engineers* is so factually dissimilar from the present case that neither its holding nor dicta lend any support to Petitioners' futile argument.

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<sup>10</sup> Brass Ring-Olympia Brief at p. 14.

*Young Engineers* involves the *res judicata* effect of a prior patent infringement lawsuit on proceedings before the International Trade Commission ("ITC"). The defendant argued that the ITC's investigation involved a continuing course of conduct which was the same as that attacked in prior civil litigation. The court noted that even if it were to apply a broad view of claim preclusion, no authority existed to apply the doctrine to conduct of a different nature from that involved in the prior litigation. *Young Engineers, Inc.*, at 316. The court then held that an infringement claim, for purposes of claim preclusion, does not embrace more than the specific device before the court in the first suit. Since the ITC found the devices at issue to be "new models", the court found the defendant's position untenable. *Young Engineers, Id.*

If anything, *Young Engineers* supports the Sixth Circuit's decision, since the court refused to apply *res judicata* to new alleged instances of patent infringement occurring subsequent to the initial dismissal with prejudice. Similarly, the Sixth Circuit found that each post-dismissal ad hoc imposition of discriminatory pricing against Cellar Door by Petitioners constituted distinct causes of action not precluded by Cellar Door's first lawsuit. The fact that the *Young Engineers'* court noted that the defense of *res judicata* would not apply "even under a broad view of claim preclusion" certainly does not exhibit confusion as to the scope of the *Lawlor* decision. The finding of the *Young Engineers'* court is consistent both with *Lawlor* and the Sixth Circuit's holding in the present case.

Petitioners' reliance upon *California v. Chevron Corp.*, 872 F.2d 1410 (9th Cir. 1989) as supportive of its contention that uncertainty exists as to the application of *Lawlor*

is particularly surprising. *Chevron* indicates neither confusion nor conflict with the *Lawlor* decision. In *Chevron*, the court stated:

A judgment covering an earlier time period need not necessarily operate as a *res judicata* bar to a lawsuit covering a later period even though both suits involve essentially the same course of wrongful conduct. (*Lawlor* citation omitted). Simply alleging the same type of claims against the same defendants for a later period does not guaranty a *res judicata* bar, because factual matters, such as the conduct of the parties since the first judgment, must be considered.

(Citations omitted). *Chevron*, at 1415.

This opinion is completely consistent with *Lawlor* and the Sixth Circuit decision. The first sentence establishes that the dismissal of an initial lawsuit does not necessarily bar a second lawsuit covering a later period of time. The second sentence points out that the time period, alone, is not the only factor, but the type of conduct involved must also be considered. This analysis was conducted by the Sixth Circuit and in *Lawlor*. Neither court imposed a "per se rule" involving solely an analysis of the involved time period, but rather examined the nature of post-dismissal violations of antitrust laws and found that each violation constituted a distinct cause of action.

Similarly, Petitioners' dependence upon *Harkins Amusement Enterprises v. Harry Nace Co.*, 890 F.2d 181 (9th Cir. 1989) is misplaced. The *Harkins'* decision is in complete accord with *Lawlor* and exhibits no confusion or uncertainty:

*It is elementary that new antitrust violations may be alleged after the date covered by decision or settlement of antitrust claims covering an earlier period. (Citations, including Lawlor, omitted). Failure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time. (Lawlor citation omitted). As Areeda puts it: "It cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust suit is generally held to give rise to a new cause of action." 2 P. Areeda and D. Turner, *Antitrust Laws* § 323c 1978 (footnote omitted). The defendants by winning *Harkins I* did not acquire immunity in perpetuity from the antitrust laws. (*Chevron* citation omitted).*

(Emphasis provided). *Harkins*, at 183.

Petitioners place undue reliance on the remark by the *Harkins'* court that the facts in *Harkins II* "are at least ten percent different from the facts alleged in *Harkins I*". Petitioners omitted from their citation the remainder of that sentence, wherein the Court continued "and, of course, the plaintiff alleges conduct that occurred in a different time period." This pronouncement illustrates that *Harkins* falls directly within the *Lawlor* holding.

The fatal flaw in Petitioners' attempt to create uncertainty or a conflict among the circuits emanates from its ill-fated attempt to classify the Sixth Circuit's holding as a "per se rule" that eliminates the applicability of claim preclusion to any conduct occurring after an initial dismissal order. To the contrary, the Sixth Circuit made no attempt to establish a "per se rule", but rather focused on the unique nature of the ongoing conduct complained of by Cellar Door, as well as the generic nature of a continuing scheme to violate antitrust laws. Relying upon

*Ohio-Sealey* and *Cream Top*, the Sixth Circuit opined that in the context of a continuing scheme to violate antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct and harms the plaintiff:

Thus, Olympia's and Brass Ring's course of conduct could give rise to more than one cause of action. Each time their arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Those causes of action accruing subsequent to the 1983 dismissal are, therefore, not barred by *res judicata*.

**E. The Sixth Circuit's Decision Is Not Incompatible With Modern Conceptions Of Claim Preclusion.**

Petitioners aver that the purported lower court confusion concerning *Lawlor* stems from a "dramatic transformation" in the law of *res judicata*, as exemplified by the Restatement Judgments (2nd) ("Second Restatement"). Petitioners argue that the Second Restatement manifests a significantly broader and more flexible approach to claim preclusion. According to Petitioners, under the Second Restatement approach, preclusion generally applies to rights that arise out of the same "transaction, or series of connected transactions." Petitioners argue that the Sixth Circuit's decision is suspect since it fails to cite or apply the Second Restatement or transactional test. Conspicuous by its absence is any analysis by Petitioners establishing that either the Sixth Circuit's holding or the *Lawlor* court's rationale are in any way inconsistent with the "transactional analysis test."

Implicitly, if not explicitly, the *Lawlor* court recognized the separate transactional character of the post-dismissal antitrust violations in holding antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff. In fact, *Lawlor* was cited for that very proposition by the court in *Ohio-Sealy*. In reliance upon *Lawlor*, the court in *Ohio-Sealy* stated:

If the defendant continues the same scheme to violate the antitrust laws after trial, a new cause of action accrues to the plaintiff for any damages caused by the defendant's post-verdict antitrust conduct. *Lawlor v. National Screen Service Corp.*, 49 U.S. at 327-28, 75 S.Ct. at 868. In that instance, the plaintiff is entitled to file a new lawsuit to recover these post-verdict damages. *Id.*

\* \* \*

. . . For those damages that *Ohio* seeks which were caused by antitrust conduct occurring after the verdict in this case, *Ohio* has an independent cause of action that it may pursue in another lawsuit. (*Lawlor* citation omitted). *Ohio-Sealy*, at 494.

Petitioners' argument is also contradicted by the continued adherence to the *Lawlor* decision by all courts, including the Sixth Circuit, subsequent to the date after which Petitioners question *Lawlor's* applicability due to the "transformation" of the law of claim preclusion.<sup>11</sup>

Petitioners' reliance upon the Second Restatement is misplaced. Petitioners refer to the Second Restatement

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<sup>11</sup> See cases cited in footnote 2.

§ 24 in support of their contention that an identity of the causes of action exists with respect to the first and second lawsuits. Significantly, Petitioners fail to reference illustration 12 under § 24:

*"The government fails in an action against a defendant under an antitrust statute for lack of adequate proof that the defendant participated in a conspiracy to restrain trade. The government is not precluded from a second action against the same defendant in which it relies on conspiratorial acts post-dating the judgment in the first action, and may rely also on facts preceding the judgment insofar as these lend significance to the later acts."* (Emphasis provided).

Second Restatement, at 204.

Contrary to Petitioners' contention, the Sixth Circuit's decision is perfectly consistent with illustration 12. Presumably, Petitioners' failure to recognize this compatibility stems from its lack of recognition that the Sixth Circuit's decision does not establish a "per se rule", as so vigorously argued by Petitioners. Rather, the Sixth Circuit's holding is reliant upon the separate transactional nature of the antitrust violations alleged by Cellar Door to have occurred subsequent to the dismissal of the initial lawsuit.

Brass Ring and Olympia's current posture with respect to "the arrangement" obviously attempts to portray their conduct as involving merely a single business transaction in order to support an application of *res judicata* principles. To the contrary, Brass Ring and Olympia previously denied the existence of a firm arrangement,

and characterized their dealings as consisting of "ad hoc" decisions to co-promote specific events.<sup>12</sup>

Each event-by-event agreement that effectively precluded Cellar Door from competing on equal terms to promote a particular event established the basis for a cause of action in Cellar Door's favor. Leffler's deposition testimony illustrates the manner in which Brass Ring and Olympia's conduct denied Cellar Door equal access for a concert in 1986. Brass Ring and Olympia may have acted to unfairly eliminate Cellar Door's competition in a different manner with respect to other proposed events. Each time Brass Ring and Olympia acted to preclude

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<sup>12</sup> Robert Fox, Brass Ring's president, stated in an affidavit filed in the first action:

This . . . it was finally agreed that Brass Ring would attempt to co-promote with the Olympia Organization on an *ad hoc* basis for particular acts which were targeted to be enticed into the downtown facilities . . . it was decided that either party would have the option to participate or not participate based upon the merits of each individual proposed event. (App. C, p. C-2-3).

Likewise, in response to paragraph 12A of Cellar Door's complaint, Olympia averred:

Answering . . . the defendants deny that OAI has entered into a joint venture with Brass Ring. Rather, in late 1982, OAI and Brass Ring decided to jointly promote musical events in order to compete with Pine Knob during the summer, 1983 season. Their agreement has only been used in a limited fashion and it has been on a [sic] event by event basis with no agreement to continue for any length of time. (App. D, p. D-2).

Cellar Door from competitively bidding for an event, through the imposition of discriminatorily high rental prices, a cause of action accrued to Cellar Door.<sup>13</sup>

**F. A Number Of Important Policies Dictate Against A Grant Of The Petition For Writ Of Certiorari.**

This Court has not been inclined to grant certiorari to resolve alleged conflicts among appellate courts over issues that are unlikely to recur or result from a unique factual situation. Nor will differences between two circuits likely be accepted as a sufficient conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved. The Court's tendency has been to accept cases for review only when they present a conflict among circuits as to an important federal question. Increasingly, the Court has shaped its case load toward constitutional and related issues. 13 *Moore's Federal Practice* (2d ed.) pp. 17-21, 22, 39, citing *Harlan, "Manning the Dikes"*, 13 *Record NYCBA* 541, 551-552 (1958).

Here, none of these considerations is present. The Sixth Circuit decision involves neither a material or significant conflict among appellate courts nor an important federal or constitutional question. Moreover, the unique factual circumstances involved in the dispute between Brass Ring-Olympia and Cellar Door makes this case unsuitable for the Court to establish a precedential ruling. Furthermore, *Lawlor* and its progeny establish more

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<sup>13</sup> *Ohio-Sealy*, at 494; *Cream Top* at 363.

than a sufficient basis to guide federal courts on the application of *res judicata* in successive antitrust lawsuits.

Furthermore, the Sixth Circuit decision does not pose a danger to "settlements", as argued by Petitioners, or the policy favoring finality of lawsuits. The first Cellar Door lawsuit did not involve a "settlement", but rather an unfulfilled agreement by Olympia to open the Arenas to Cellar Door. Moreover, the dismissal with prejudice did extinguish Cellar Door's right to sue the Petitioners for the wrongful conduct that occurred prior to the entry of the order. Consequently, Petitioners did obtain finality as to occurrences that preceded the dismissal of the first lawsuit. Additionally, Petitioners do not face the prospect of unending litigation with respect to their practices in connection with the leasing of the Arenas. A determination in this lawsuit as to the legality of these practices certainly, at the very least, will have collateral estoppel effect that can be relied upon by all parties regarding future conduct.

Finally, the important public policy favoring the vigilant enforcement of antitrust laws clearly is enhanced by the Sixth Circuit's decision. The dismissal of the first lawsuit should not, as Petitioners would have this Court rule, arm Petitioners with perpetual immunity from antitrust violations, especially in view of the fact that the District Court made no findings as to the propriety of Brass Ring and Olympia's conduct. The *Lawlor* court placed strong emphasis on this consideration, and concluded that extending the *res judicata* defense in the manner urged by Petitioners would create a result "consistent

with neither the antitrust laws nor the doctrine of *res judicata*." *Lawlor*, at 329.<sup>14</sup>

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CONCLUSION

Cellar Door respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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*Attorneys for Respondent*  
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Bloomfield Hills, MI 48013  
(313) 335-5000

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<sup>14</sup> A more detailed reference to the *Lawlor* court's discussion of this public policy is found at pages 8-9 of this brief.

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No.

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IN THE  
SUPREME COURT  
OF THE UNITED STATES  
October Term, 1989

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RICK KAY, ROBERT FOX, ROBERT CAVALIERI,  
MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD.,  
MICHAEL TINIK, OLYMPIA ARENAS, INC.,

*Petitioners,*

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,

*Respondent.*

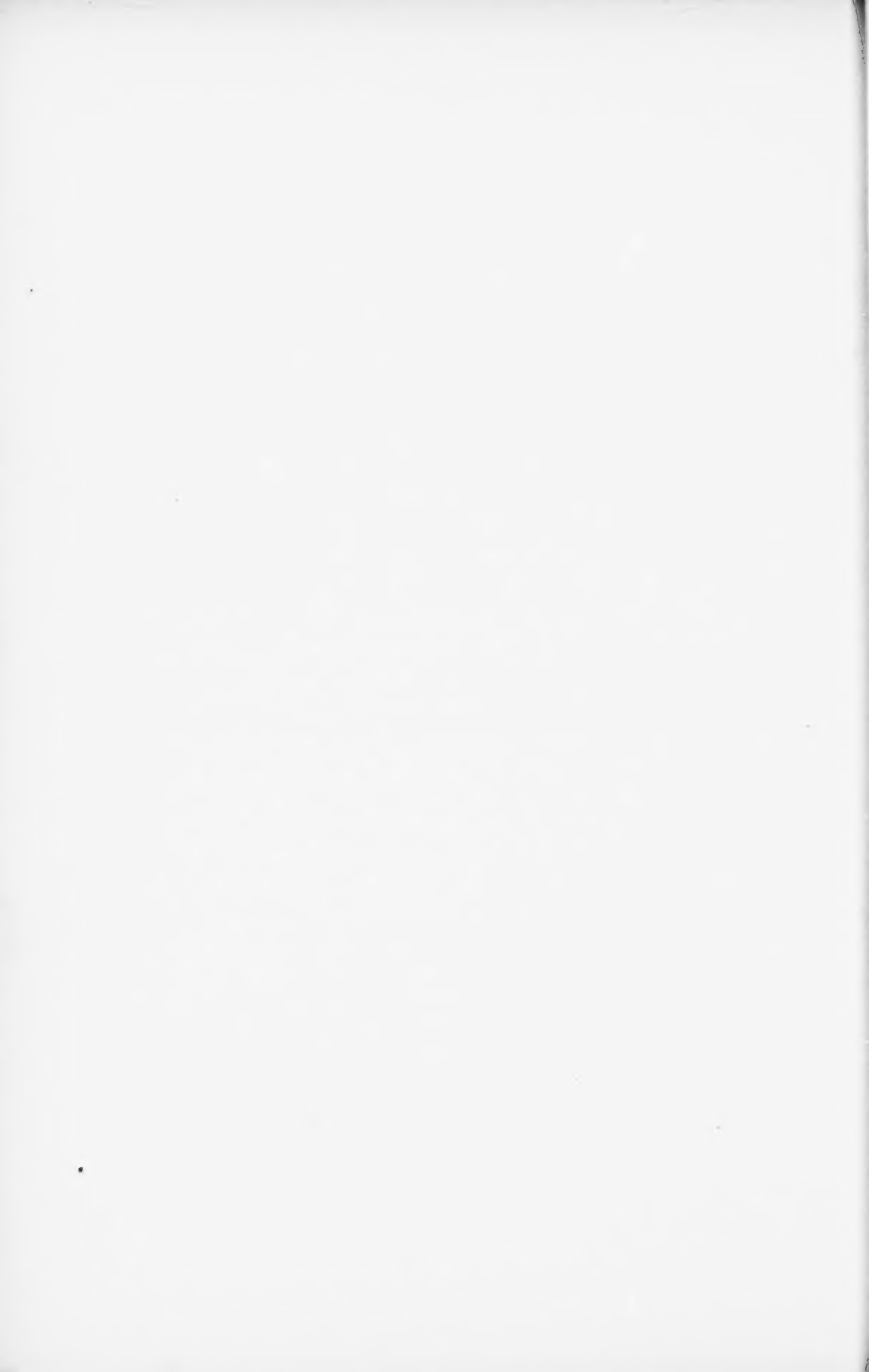
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APPENDIX

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STEVE J. WEISS\*  
HERTZ, SCHRAM & SARETSKY, P.C.  
1760 S. Telegraph Rd., Suite 300  
Boomfield Hills Michigan 48013  
313/335-5000  
Attorneys for Respondent  
\*Counsel of Record

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(213) 857-1010

\* \* \*

(p. 8) Van Halen would play on that tour?

A. Absolutely.

Q. And what opinion did you have as to the appropriate facility for Van Halen to play on that tour for the Detroit market?

MR. HARNISCH: Objection; lack of foundation.

BY MR. KRAMER:

Q. You may answer.

Off the record.

(Discussion off the record.)

THE WITNESS: Would you re-ask the last question.

MR. KRAMER: Miss Reporter, please.

(Record read.)

THE WITNESS: My opinion was that they should play Joe Louis Arena.

BY MR. KRAMER:

Q. And would you tell Judge Taylor and the jury why.

A. Because it was -

MR. HARNISCH: I'm going to interpose the same objection.

BY MR. KRAMER:

Q. Yes. Go ahead.

A. Because it was the largest venue that wasn't too large a venue in the Detroit marketplace and was also

\* \* \*

(p. 11) THE WITNESS: The reason is that the audience and the fans expect a band that they gave - if they're that big, they should play the biggest place that they - that they can; A, so more people can see them; and B, so that they're not thought of as less than some other band. That people would question why Van Halen didn't play - if they played a 4,000-seat theater, why they weren't playing a bigger place, where actually the audience themselves are used to going and seem to like to go.

BY MR. KRAMER:

Q. In your experience, Mr. Leffler, with regard to the Detroit market, for a band such as Van Halen that is capable of filling the Joe Louis Arena, is there a, in real life, viable, practical substitute for the Louis Arena in the Detroit market?

MR. HARNISCH: I -

MR. KRAMER: You have a continuing objection.

MR. HARNISCH: Thank you.

THE WITNESS: In my opinion, no. There is a larger facility which is Pontiac Stadium, but I think Pontiac is too big.

BY MR. KRAMER:

Q. Could you explain to the court and the jury why, in your view, for an act such as Van Halen, there is no viable, practical substitute to Joe Louis Arena for a (p. 12) band such -

MR. HARNISCH: Same objection.

MR. KRAMER: Continuing objection.

THE WITNESS: I can't say that it's my opinion there is none for an act of that stature. Joe Louis is the best place to play.

For instance, we could play Cobo Hall. And I believe, prior to me managing Van Halen, they - Van Halen, the tour before, did play Cobo Hall. Whether it was a question of availability of the facility or not, I don't know. I don't know.

But when you schedule a tour and you tour around the whole country, the artists themselves do have a tendency of getting tired, so you only have them for a certain amount of days. So when you lay a tour out, you try and lay it out to maximize in every area of the country that there are appearances. To me, it's within the realm of what is feasible and best for the artist. Joe Louis is truthfully the only choice in Detroit that I would make.

BY MR. KRAMER:

Q. Mr. Leffler, would it be a viable substitute, as the manager of Van Halen, for you to have presented to you Pontiac Silverdome in, let's say a configuration which would have a 20,000-seat capacity or approximately a 20,000-seat capacity?

\* \* \*

(p. 14) Boston at one time on – they played Pontiac Stadium, and I think they did – I don't remember the numbers, 40 or 50,000 people, and they came back and tried to play a couple nights at Cobo Hall, and the first time anywhere on their tour, they didn't sell Cobo Hall out. They did two nights, and I think the second night was not sold out. So I felt at that time it tarnished the image of the band Boston, for that moment, anyway.

Q. Thank you, sir. For whom did you play – when I say “you,” Van Halen – at Joe Louis Arena in May of 1986?

A. Brass Ring.

Q. And do you recall why you decided to play for Brass Ring on that date in Detroit at Joe Louis Arena?

A. They made me an offer that, on behalf of my fiduciary relationship with my band, I – it was considerably a better deal than anyone else offered.

Q. And did you receive some offer from Cellar Door for that date? And was the Brass Ring offer better than Cellar Door's worse than Cellar Door? How did it compare to the Cellar Door offer?

A. It was substantially better.

Q. With whom did you discuss the proposed date at Brass Ring?

A. Rick Kay.

\* \* \*

(p.16) can't - I would think it was somewhere - November, December of 1985, I guess, but I could be wrong. I'm not sure.

The first conversation was by phone.

Q. Did he call you or did you call him?

A. He called me.

Q. He called you. Okay. What did he say when he called you?

A. "I'd like to play Van Halen in Detroit?"

Q. And do you recall what you said to him?

A. Would you hold for a second. I'm about to use some vile language, if you don't mind.

Q. The court reporter understands you're under oath and obligated to tell exactly what was said, to the best of your recollection, Mr. Leffler. The judge understands that and the jury will understand that.

A. I don't mean to offend you.

Q. Please, can you tell me what you said to Mr. Kay and what he said to you during that first conversation.

A. "I can't believe you're calling me, you no good son - fucking son of a bitch," or something like that.

Q. Can you tell us why you had such a response to Mr. Kay?

(p. 17) A. Yes.

Q. Would you tell us.

A. The lead singer of the newly constituted Van Halen was a gentleman by the name of Sammy Hagar. And I had done two tours prior to him joining Van Halen. Mr. Kay had agree to – at Cobo Hall, to promote Sammy Hagar individually.

I, in order to give him the best chance of being successful on that date, rerouted my tour to allow him a Saturday date, which historically Friday, Saturday nights are the best nights for concerts. And with – turned down a lot of money at another facility in another city in order to accommodate him.

And prior – after he agreed to do the date, he changed his mind and decided he would not promote the date. Which frankly, we deal in this business with one's word, and it infuriated me.

Therefore, I was not feeling very friendly to Mr. Kay, and hadn't for those couple years after he did that.

Q. After you made this comment to Mr. Kay that you just related, did he respond during this first phone conversation?

A. Yeah. He said, "Look, I can understand how you feel, and I know we've had a – an acrimonious" – I (p. 18) don't think he used that word, but that's what he implied – "relationship. And – however, I can make your band a lot more money than if you play with Cellar Door, so I'd like to come out and see you."

Q. Did he?

A. Yes, he did. But only after I had said to him that "If you're talking about \$10,000, take it and shove it up your ass. I don't want to do business with you."

And he said, I'm "talking about considerably more amount of money than that."

And I said, at that point, "I have - look, I guess I'm going to have to see you because I have responsibility to my band to at least listen to that," even though my personal feelings were such that I would prefer not to play for him.

Q. And did he, in fact, come out to Los Angeles to meet with you at your office?

A. Yes, he did.

Q. Do you remember what type of time span elapsed between that phone conversation and this trip to Los Angeles?

A. Not really.

Q. Days, weeks?

A. Within a month. May have been two weeks. I don't remember.

(p. 19) Q. Okay. Who was present during your meeting with Mr. Kay in Los Angeles besides yourself and Mr. Kay?

A. Just he and I.

Q. And do you recall where that took place, that meeting?

A. Excuse me?

Q. Do you recall where that meeting took place?

A. Right here.

Q. In your office, where we are today?

A. Mm-hmm.

Q. What did Mr. Kay say to you and what did you say to him, sir?

A. He laid out an offer to me that was substantially better than anything I could - had received from Cellar Door.

Q. Did he explain how he could make such an offer?

A. He did say that he had an arrangement with the building that made it impossible for anyone else to get - offer me as good a deal.

Q. Do you have a recollection - I know it's a while ago, Mr. Leffler, of what that offer was?

A. Well, in order to - he made an offer, because he clearly didn't want me - which I understood and I didn't blame him either, to - nor did I ask - he made (p. 20) what we call a gross offer, percentage offer of the gross dollars, as opposed to what our normal deal was, where we would make X percent after expenses were deducted. And in comparing the two, there was no choice.

Q. When you say "comparing the two, there was no choice" -

A. Comparing the offer from Cellar Door and from Brass Ring, there was no choice as far as what was in the best interests of my band.

Q. Do you recall, Mr. Leffler, going back to Cellar Door and seeing if they could meet that offer, or anything of that nature?

A. I didn't ask them to meet the offer, as such. I told them that this was the offer I had received, and that I felt I probably was going to have to do the deal with Brass Ring.

Q. Who did you have that conversation with at Cellar Door?

A. Jack Boyle.

Q. And did he respond in any way?

A. Yeah. When I told him what the offer was, he said, "I don't blame you. You should take that offer."

Q. Mr. Leffler, had Cellar Door matched the Brass Ring offer that Rick Kay gave to you, for whom would you have advised your band, Van Halen, to pay on that tour, (p. 21) May 1986, Joe Louis Arena?

Mr. HARNISCH: Objection. Lack of foundation, calls for speculation and conclusion.

MR. KRAMER: You have a continuing objection.

THE WITNESS: There is no speculation involved. I would clearly have told them<sup>\*</sup> to - I would have advised them to play for Cellar Door, especially since Cellar Door promoted Van Halen in the past in Detroit, or in the recent past.

And also because Cellar Door had promoted - when Mr. Kay reneged on his date - Cellar Door came in and

promoted the next two tours for Mr. Hagar. So there would have been absolutely no speculation. It would have been Cellar Door.

MR. KRAMER: No further questions. Thank you, Mr. Leffler.

EXAMINATION

BY MR. NOVAK:

Q. Mr. Leffler, my name is Michael Novak, and I represent several of the co-defendants in this case, including Rick Kay, Robert Fox, Charles Forbes, Prophet Productions Limited, Michael Tinik, Vincent Bannon, and The Building Group.

I'd like to ask you a few questions about the

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**APPENDIX B**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

CELLAR DOOR  
PRODUCTIONS,  
INC., OF MICHIGAN,

Plaintiff,

CIVIL ACTION NO.  
87 CV 70397 DT

v.

RICK KAY, et al.,

Defendants.

\_\_\_\_\_/

DEFENDANTS' KAY, FOX AND TINIK MOTION FOR  
SUMMARY JUDGMENT

DEFENDANTS' OLYMPIA, CAVALIERI AND ILLITCH  
MOTION FOR SUMMARY JUDGMENT

DEFENDANT CITY OF DETROIT'S RENEWED  
MOTION FOR DISMISSAL

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, October 19, 1987.

**APPEARANCES:**

STEVEN KRAMER, ESQ.,  
STEVE J. WEISS, ESQ.,  
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,  
On behalf of Defendants Kay, Fox, Forbes, Prophet  
Productions, Tinik, Bannon, and The Building Group.

ALAN C. HARNISCH, ESQ.,

On behalf of Defendants Cavalieri, Illitch and Olympia.

CHARLES A. MOORE, ESQ.,

On behalf of Defendant City of Detroit.

\* \* \*

(p. 18) *Car Carrier* was decided on a stipulated dismissal with prejudice or whether it was under a Rule 56 motion.

But, be that as it may, the point is that for purposes of *res judicata* as opposed to what he's saying, which is for purposes of collateral estoppel, a dismissal with prejudice satisfies *res judicata*. That I am absolutely unequivocally convinced of.

And what has happened time and time again is that where there is – as the court said in *Harkin versus Nance*, and *Ford versus Car Carrier*, and even I believe it was Judge LaPlata in the *Gurowski* case here, that the continuation of that conduct which has been deemed to be lawful has been held to be within the transactional definition of a claim, and therefore, if there was a dismissal on the merits –

THE COURT: Well, this Court didn't deem it anything. It hasn't been deemed lawful.

MR. FREYDL: I'm sorry. I can appreciate that.

THE COURT: This Court has a voluntary dismissal with prejudice, and that's the basis of my rulings.

MR. FREYDL: Yes, ma'am. And that's exactly right, it was a voluntary – and that satisfies *res judicata*. It does

not – and I agree with counsel, it does not satisfy collateral estoppel.

That is, if you have issues that are joined that are identical but come under different causes of action,

\* \* \*

(p. 24) THE COURT: I think you're mixing apples and oranges, because the conduct hasn't been adjudicated lawful, you see.

MR. FREYDL: Well, the effect of the dismissal with prejudice is to give it the same effect for purposes of adjudication as to make it lawful conduct since it gave the defendant, as the court has said, every possible benefit of an adjudication by a jury. That was the effect of the dismissal with prejudice.

THE COURT: All right. Thank you.

The Court is going to grant the defendants' Fox, Tinik and Kay motion for summary judgment on the basis of the doctrine of *res judicata*. The first action between these parties or their privies was decided on the merits. A voluntary dismissal with prejudice was entered by this Court in November of 1983. The matters contested in the second action were decided by the first dismissal with prejudice, and are identical today. They concern an exclusive lease agreement between defendant Prophet Productions, d/b/a Brass Ring, Olympia Stadium and Olympia Arena, which was alleged to have denied plaintiff access to Cobo Hall and Joe Louis Arena, and in which the plaintiff claims to have been charged discriminatorily high rental rates.

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**APPENDIX C**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

CELLAR DOOR  
PRODUCTIONS,  
INC. OF MICHIGAN, a  
Michigan corporation,

Plaintiff

-vs-

OLYMPIA STADIUM  
CORPORATION,  
a Michigan  
corporation; OLYMPIA  
ARENAS, INC., a Michigan  
corporation; and PROPHET  
PRODUCTIONS, LTD., a  
Michigan corporation,

Defendants

\_\_\_\_\_/

Honorable  
Anna Diggs Taylor

Case No.  
83-CV-2560-DT

Howard E. O'Leary (P-18461)  
Jeffrey M. Lipshaw (P-30713)  
Attorneys for Plaintiff

T. Patrick Freydl (P-13705)  
Attorney for Defendant Prophet Productions, Ltd. only

James R. Lites (P-29265)  
Richard A. Solomon (P-20777)  
Attorneys for Defendants Olympia only

**AFFIDAVIT OF ROBERT A. FOX, PRESIDENT OF  
PROPHET PRODUCTIONS d/b/a BRASS RING  
PRODUCTIONS IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY INJUNCTION**

STATE OF MICHIGAN            )  
  ) ss  
COUNTY OF OAKLAND        )

ROBERT A. FOX, being first duly sworn, deposes and states as follows:

1. That he is the President of Brass Ring Productions which is the trade name of PROPHET PRODUCTIONS, LTD. one of the Defendants in the above entitled action.

\*       \*       \*

11. . . . Accordingly, it was agreed that Brass Ring with its promotional expertise and experience would participate in an experiment with the Olympia Organization which was specifically applicable to the Pine Knob season (in order not to jeopardize the regular rental schedules observed during the winter season). Thus, by its terms it was finally agreed that Brass Ring would attempt to co-promote with the Olympia Organization on an *ad hoc* basis for particular acts which were targeted to be inticed into the downtown facilities which acts would otherwise appear at Pine Knob for the handsome financial take-outs offered by the Nederlander Organization. It was decided that either party would have the option to participate or not participate based upon the merits of each individual proposed event.

12. In this specific regard during January and February of 1983, Brass ring tendered initial offers to various agencies for acts which traditionally play the Pine Knob Music Theatre and which would be touring during the summer of 1983. Because the Olympia facility was in essence co-promoting each particular project with Brass

Ring, Brass Ring was able to offer a competitive alternative to Pine Knob. The so-called arrangement with the Olympia Organization is nothing more than a loose agreement to structure offers to a specific act on flexible terms. It is not exclusive nor permanent.

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**APPENDIX D**

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

CELLAR DOOR PRODUCTIONS,  
INC. OF MICHIGAN, a  
Michigan corporation

Plaintiff,

vs.

RICK KAY, ROBERT FOX,  
ROBERT CAVALIERI, CHARLES  
FORBES, MICHAEL ILITCH,  
OLYMPIA STADIUM  
CORPORATION, a Michigan  
corporation; OLYMPIA  
ARENAS, INC., a Michigan  
corporation; PROPHET  
PRODUCTIONS LTD., a  
Michigan corporation,  
MICHAEL TINIK, VINCENT  
BANNON, and THE BUILDING  
GROUP, CITY OF DETROIT,

Defendants.

\_\_\_\_\_ /

\* \* \*

Case No.  
87-CV-70397DT

Hon.  
Patrick J. Duggan

ANSWER TO COMPLAINT AND  
AFFIRMATIVE DEFENSES

\* \* \*

12A. Answering paragraph 12(a) of the Complaint, the Defendants deny that OAI has entered into a joint venture with BRASS RING. Rather, in late 1982, OAI and BRASS RING decided to jointly promote musical events in order to compete with Pine Knob during the summer, 1983 season. Their agreement has only been used in a limited fashion and it has been on a event by event basis with no agreement to continue for any length of time. Further, there is no agreement for exclusivity of use at either Joe Louis Arena or Cobo Arena, and no agreement that OAI would refuse to co-promote with others.

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